No. 89-1140

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. When a state court has properly authorized electronic surveillance of communications concerning state offenses listed in Title III of the Omnibus Crime Control and Safe Streets Act, may that court, under 18 U.S.C. 2517(5), authorize the use in grand jury proceedings of communications intercepted during the surveillance that relate to federal offenses not listed in Title III?

2. Was the district court required to make an additional in camera review of the surveillance order and supporting affidavits in this case?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 889 F.2d 384. The judgment of the district court (Pet. App. 18a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on September 18, 1989. On December 14, 1989, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including January 16, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, who was subpoenaed to testify before a grand jury, contends that intercepted communications were used in the grand jury proceedings in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520.

1. a. In 1982, a task force consisting of representatives of local, state, and federal law enforcement agencies was created to investigate the influence of organized crime on the distribution of fuel oil and gasoline on Long Island. Pet. App. 3a. On August 2, 1985, Suffolk County Judge Kenneth K. Rohl, acting at the request of the Attorney General of New York and on the basis of a supporting affidavit of a task force investigator, issued an order authorizing state and federal law enforcement officials to conduct electronic surveillance of the offices of Sheldon Levine in Melville, New York.[1] Levine and others, known and unknown, were suspected of committing grand larceny, falsification of business records, and conspiracy to commit those crimes, in violation of New York penal law. *Ibid.* The surveillance order authorized the interception and recording of oral communications and the videotaping and recording of physical activities relating to the state crimes. *Id.* at 4a. According to the supporting affidavit, it was anticipated that intercepted conversations would relate not only to those offenses, but also to schemes to evade the payment of local, state, and federal taxes imposed on motor fuels. *Id.* at 42a.

In November 1985, the Attorney General of New York and the Assistant Attorney-in-Charge of the

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[1] The order was issued pursuant to the New York eavesdropping statute, N.Y. Crim. Proc. Law § 700 (McKinney 1984 & 1989 Supp.)

Justice Department's Organized Crime Strike Force for the Eastern District of New York, both of whom were members of the task force, submitted affidavits to Judge Rohl stating that surveillance already conducted had revealed evidence of federal crimes, including federal tax offenses. They requested amendment of the August 2 order to permit use of that evidence before a federal grand jury investigating, inter alia, violations of federal tax laws. The request was based on 18 U.S.C. 2517(5), which provides that when a law enforcement officer, while engaged in the authorized interception of communications, intercepts communications "relating to offenses other than those specified in the order of authorization or approval," the contents and evidence derived therefrom may, with judicial approval, be disclosed in judicial proceedings. Pet. App. 4a.

On November 8, 1985, Judge Rohl granted the request and amended the August 2 order to permit all intercepted oral communications relating to federal crimes to be used in federal grand jury proceedings or in any court of the United States. The amended order specifically listed various federal crimes, including violations of the tax laws, 26 U.S.C. 7201, 7202, 7203 and 7206(1) and (2). Pet. App. 4a-5a.[2]

Judge Rohl subsequently signed extensions of the surveillance order on November 22 and December 20,

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[2] The other federal crimes listed were violations of 18 U.S.C. 1962 and 1963 (racketeer influenced and corrupt organizations); 18 U.S.C. 1503, 1510 and 1512 (obstruction of justice, obstruction of a criminal investigation, and tampering with a witness); 18 U.S.C. 1341 (mail fraud); 18 U.S.C. 2314 and 2315 (interstate transportation, receipt, and sale of stolen property); 18 U.S.C. 1621-1623 (perjury); 18 U.S.C. 371 (conspiracy); and the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 5315.

1985, again authorizing interception of communications relating to the three state crimes supporting the original surveillance order. The interceptions ended on January 10, 1986. *United States* v. *Levine*, 690 F. Supp. 1165, 1168 (E.D.N.Y. 1988).

b. Petitioner's name was revealed during the surveillance. On July 29, 1988, petitioner was served with a subpoena directing him to appear before a federal grand jury. He moved to quash the subpoena and suppress evidence, contending that the order and extension orders authorizing surveillance of Levine's office were facially invalid. C.A. App. 3-21. The court, per Judge Leonard D. Wexler, denied the motion on August 4, 1989. Pet. App. 15a-17a. In its memorandum opinion, the court cited the opinion of Judge Eugene Nickerson in *United States* v. *Levine*, which, in the prosecution of the target, Sheldon Levine, held the surveillance valid in all respects. Judge Wexler recognized that he was not bound by the *Levine* decision, but he found "Judge Nickerson's reasoning both compelling and correct." Pet. App. 17a.

Petitioner appeared before the grand jury on August 16 and refused to testify, claiming that the electronic surveillance was illegal. After a hearing the same day, the district court ascertained that petitioner understood the consequences of his refusal to testify, cited him for civil contempt, and committed him to the custody of the Marshal until he obeyed the order. Pet. App. 5a-6a, 18a-19a.

2. The court of appeals affirmed the judgment of civil contempt. Pet. App. 1a-12a. It first rejected petitioner's argument that he was entitled to in camera review of the validity of the surveillance orders before he could be compelled to testify. Noting that the district court had been furnished with Judge Rohl's surveillance orders and the supporting affida-

vits and had afforded petitioner an opportunity to file papers in support of his motion to quash the subpoena, the court concluded that the district court had fully considered petitioner's contentions and that an additional in camera review was unnecessary. *Id.* at 6a-7a.

The court of appeals next rejected petitioner's contention that the district court's authorization orders were facially invalid to the extent they permitted use of communications in connection with federal tax offenses. Relying on the legislative history of 18 U.S.C. 2517(5) (see S. Rep. No. 1097, 90th Cong., 2d Sess. 100 (1968)), decisions of other courts of appeals (see *United States* v. *McKinnon*, 721 F.2d 19, 22-23 (1st Cir. 1983); *United States* v. *Pacheco*, 489 F.2d 554, 564 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975)), and the district court's decision in *United States* v. *Levine* (690 F. Supp. at 1169-1171), the court of appeals held that an amended order may authorize use of intercepted communications relating to federal offenses that could not in themselves be the basis for a surveillance order, so long as the order was sought in good faith and not as a subterfuge and the communications were incidentally intercepted during the course of a lawfully executed order. Pet. App. 7a-11a. The court found that test satisfied here. It noted that petitioner did not charge federal officials with instigating the authorization application "largely to secure evidence of violations of federal tax crimes or that there was otherwise bad faith or deception on their part," and it found "no indication, nor even any assertion by [petitioner], that the disclosures regarding federal crimes were anything other than an incidental by-product of the first surveillance." *Id.* at 9a.

Finally, the court of appeals held that federal law enforcement officials were not barred from applying to Judge Rohl, a state judge, for authorization to use intercepted communications as evidence of federal crimes. Pet. App. 11a-12a. The court pointed out that Section 2517(5) permits a "judge of competent jurisdiction" to amend a surveillance order and that Judge Rohl was such a judge, since the definition of the quoted term in 18 U.S.C. 2510(9) includes "a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications." Pet. App. 12a. The court further observed that "[i]t would make little sense, and would serve no public policy, to deny federal law enforcement agencies the use of evidence that has been serendipitously discovered in the course of surveillance conducted according to law." *Ibid.*

ARGUMENT

The court of appeals correctly rejected petitioner's challenges to the grand jury's use of lawfully intercepted communications concerning his involvement in federal tax offenses. Its ruling does not conflict with any decision of this Court or another court of appeals. Review by this Court, therefore, is not warranted.

1. a. The interception of wire, oral, and electronic communications is regulated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at Chapter 119 of Title 18 of the United States Code, 18 U.S.C. 2510-2520. Section 2511 generally prohibits the interception and disclosure of such communications. Under Section 2515, if a wire or oral communication has been intercepted in violation

of Title III, "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof."

Title III does permit interception and use of wire or oral communications under certain circumstances. Section 2516 provides that a federal or state "judge of competent jurisdiction" may authorize interception of such communications, upon an application authorized by any of certain state and federal officials, if the interception may provide evidence of certain designated offenses. As petitioner correctly points out (Pet. 12-13), federal tax offenses are not among the designated offenses on which an initial authorization or approval order may be based.

Section 2517 governs the disclosure and use of oral or wire communications that are lawfully intercepted pursuant to a proper authorization order. Of particular relevance here, Section 2517(5), which authorizes use of lawfully intercepted communications relating to "offenses other than those specified in the order of authorization or approval," provides that such evidence may be used in grand jury or judicial proceedings if a judge of competent jurisdiction finds that "the contents were otherwise intercepted in accordance with the provisions of this chapter." A witness who refuses to testify may defend against charges of civil contempt by showing that he was the victim of illegal electronic surveillance and that questions put to him are based on that surveillance. *Gelbard* v. *United States*, 408 U.S. 41 (1972).

b. Petitioner argues (Pet. 13-18) that the court of appeals erroneously held that "under Section 2517,

a Court may permit electronic surveillance of *any* communications, to gather evidence of any crimes, even those which are not Title III 'designated offenses,' including the investigation of Federal excise taxes" (Pet. 13). Petitioner mischaracterizes the holding of the court of appeals. The issue it resolved was "whether an amended order can authorize *use* of communications revealing evidence of crimes that could not have been investigated under an original order." Pet. App. 8a (emphasis added). Thus, the court did not hold that Section 2517(5) allows a court to authorize future surveillance to obtain evidence of nondesignated offenses. It held only that communications that have already been lawfully intercepted in surveillance directed to designated offenses may, with court approval, be used in proceedings concerning other offenses.[3]

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[3] In an affirmation filed in the district court, petitioner's counsel stated: "On or about November 21, 1985 and other dates yet unknown, Levine was intercepted allegedly having conversations with [petitioner], during which conversations, the evasion of Federal excise taxes was discussed." C.A. App. 8. Judge Rohl's November 8, 1985, order authorizing the use of intercepted conversations relating to other offenses (Pet. App. 43a-46a) did not by its terms purport to authorize use of such evidence subsequently intercepted. However, Judge Rohl implicitly authorized and approved use of later interceptions of such evidence when, having been informed that such interceptions had previously taken place, he issued orders extending the original electronic surveillance order. See *United States* v. *Van Horn*, 789 F.2d 1492, 1503-1504 (11th Cir.), cert. denied, 479 U.S. 854 (1986); *United States* v. *McKinnon*, 721 F.2d 19, 23-24 (1st Cir. 1983); *United States* v. *Johnson*, 696 F.2d 115, 125 (D.C. Cir. 1982); *United States* v. *Masciarelli*, 558 F.2d 1064, 1067-1069 (2d Cir. 1977); *United States* v. *Marion*, 535 F.2d 697, 703 (2d Cir. 1976).

This holding was correct. Section 2517(5) provides (emphasis added):

> When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to *offenses other than those specified in the order of authorization or approval*, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

The phrase "offenses other than those specified in the order of authorization or approval" is not limited to those offenses that are designated in Section 2516 and therefore would support an order authorizing surveillance in the first instance. Thus, the text of Section 2517(5) permits the use of lawfully intercepted communications concerning any other offense, as long as other safeguards are satisfied.

Petitioner contends (Pet. 14) that a limitation to offenses designated in Section 2516 is implicit in the requirement in Section 2517(5) that "the contents were otherwise intercepted in accordance with the provisions of this chapter." This contention is without merit. Title III does not flatly prohibit all interception (and subsequent use) of communications unrelated to designated offenses. Rather, it requires surveillance to be "conducted in such a way as to *mini-*

mize the interception of communications not otherwise subject to interception under this chapter." 18 U.S.C. 2518(5) (emphasis added); see *Scott* v. *United States*, 436 U.S. 128, 140 (1978). Thus, as long as the interception of communications concerning designated offenses was duly authorized and the minimization requirement has been met, the incidental interception of communications relating to nondesignated offenses is consistent with Title III. Furthermore, the legislative history confirms that Congress did not intend the statutory text to impose the unexpressed limitation petitioner urges. As the court of appeals observed (Pet. App. 8a), the Senate Report on Title III states that the other offenses referred to in Section 2517(5) "need not be designated offenses." S. Rep. No. 1097, *supra*, at 100.

Petitioner cites no judicial decision adopting his interpretation of Section 2517(5), and we are aware of none. In fact, consistent with the ruling below, two other courts of appeals have held that a judge may authorize the use of evidence of nondesignated offenses that is intercepted in the course of authorized surveillance. *United States* v. *McKinnon*, 721 F.2d 19, 21 & n.1 (1st Cir. 1983); *United States* v. *Pacheco*, 489 F.2d 554, 564 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975).

Contrary to petitioner's assertion (Pet. 17), this construction of the statute does not sanction general searches or violate privacy rights Congress sought to protect under Title III. As the court of appeals pointed out, Congress accommodated privacy concerns not by imposing an absolute statutory prohibition on the use of lawfully intercepted communications in circumstances such as these, but by requiring judicial scrutiny to permit the use of evidence of other offenses "only upon 'a showing that the original order

was lawfully obtained, that it was sought in good faith and not as [a] subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order'." Pet. App. 8a-9a (quoting S. Rep. No. 1097, *supra*, at 100). See also *United States* v. *McKinnon*, 721 F.2d at 22; *United States* v. *Angiulo*, 847 F.2d 956, 980 (1st Cir. 1988).[4]

c. Petitioner further asserts (Pet. 15-18) that the interception of evidence of other offenses in this case was not in accord with the standard indicated by the Senate Report. In particular, he argues that the interceptions were not "incidental" because they were not unanticipated. But petitioner cites no authority holding that the interception of "other offense" evidence must be unanticipated or inadvertent.[5] Indeed,

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[4] Petitioner maintains (Pet. 18-19) that a state judge may not authorize surveillance to obtain evidence of federal crimes if a federal judge could not authorize the surveillance. We agree with this proposition, but it is immaterial here. Judge Rohl's order did not authorize anything that a federal judge could not have authorized in connection with surveillance under his supervision. Judge Rohl, in compliance with Title III, authorized use of previously intercepted evidence of federal crimes, not interception of such evidence in the first instance.

[5] The Second Circuit previously expressed the view in *United States* v. *Marion*, 535 F.2d 697, 707 & n.20 (1976), that where state and federal investigators jointly pursue an investigation from its inception, separate surveillance authorization orders would be required, "[i]nasmuch as the interception of communications relating to different federal offenses would not * * * be incidental." Relying solely on this passage in *Marion*, petitioner argues (Pet. 19-20) that separate federal and state surveillance "applications" were required in this case. As the court below pointed out (Pet. App. 10a-11a), however, the quoted passage was dictum because

the only prior decision to resolve the question, *United States* v. *McKinnon*, 721 F.2d at 22-23, held that an interception need not be unanticipated to be incidental. As the First Circuit reasoned, "[e]vidence of crimes other than those authorized in a wiretap warrant are intercepted 'incidentally' when they are the byproduct of a bona fide investigation of crimes specified in a valid warrant. Congress did not intend that a suspect be insulated from evidence of one of his illegal activities * * * merely because law enforcement agents are aware of his diversified criminal portfolio." *Id.* at 23. Thus, there is no merit to petitioner's assertion that interceptions must be unanticipated or inadvertent in order to be incidental.

As the court of appeals pointed out (Pet. App. 9a-10a), in this case, "[w]hile it was of course possible that the surveillance relating to state crimes would reveal evidence of federal crimes—motor fuel is subject to both federal and state taxation—there is no indication, nor even any assertion by [petitioner], that the disclosures regarding federal crimes were anything other than an incidental by-product of the first surveillance." Especially in these circumstances, Judge Rohl properly approved use of the evidence of federal crimes.[6]

Marion did not involve an investigation conducted jointly from its inception. In fact, the court in *Marion* upheld a Section 2517(5) approval order that was implicit in the state judge's renewal of a surveillance order. In any event, any intracircuit conflict between the decision below and the Second Circuit's prior decision in *Marion* would not warrant resolution by this Court.

[6] Petitioner does not contend that the initial surveillance in this case was a subterfuge aimed at obtaining evidence of federal crimes, and the record in fact refutes any such suggestion. The State had a substantial interest in pursuing

2. Petitioner further contends (Pet. 21-24) that the district court erroneously declined to conduct an in camera review of the facial validity of the surveillance orders. The court of appeals correctly found (Pet. App. 6a-7a) that Judge Wexler had fully considered petitioner's objections to the orders and that additional in camera review was not necessary.[7] This

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schemes such as Levine's: the affidavit supporting the initial authorization represented that New York was losing at least $90 million annually in state tax revenue from such schemes. Pet. App. 10a. In addition, the initial application and affidavit candidly informed Judge Rohl of the possibility that conversations relating to evasion of federal taxes would be discovered because of the close relationship between federal tax offenses and the enumerated state crimes. This candor indicates good faith and the absence of an intent to engage in a subterfuge. See *United States* v. *Levine*, 690 F. Supp. at 1170-1171. Moreover, the intercepted communications related to the enumerated state crimes as well as the federal tax offenses. See *United States* v. *Masciarelli*, 558 F.2d 1064, 1068 (2d Cir. 1977). Finally, based on the surveillance, a Suffolk County grand jury indicted Levine, charging him with 1004 violations of the New York penal law. Pet. App. 9a-10a; *United States* v. *Levine*, 690 F.2d at 1171. See *United States* v. *McKinnon*, 721 F.2d at 22; *United States* v. *Masciarelli*, 558 F.2d at 1069.

[7] We note that although courts have conducted reviews of the facial validity of surveillance orders at the behest of grand jury witnesses (see, *e.g.*, *United States* v. *Petito*, 671 F.2d 68, 74 (2d Cir.), cert. denied, 459 U.S. 824 (1982)), the legislative history of Title III suggests that a grand jury witness is not entitled to any review of the facial validity of court orders authorizing electronic surveillance. The Senate Report states (S. Rep. No. 1097, *supra*, at 106):

> Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury,

factual determination finds ample support in the record and does not warrant review by this Court.

As the court of appeals pointed out, Judge Wexler was provided with the text of Judge Rohl's authorizations and the supporting affidavits, and Judge Wexler afforded petitioner an opportunity to file papers in support of his position. Petitioner therefore had a greater opportunity to attempt to persuade the court than a mere in camera review would have afforded. Moreover, Judge Wexler's ruling indicates that he gave full consideration to the materials before him. While recognizing that he was not bound by Judge Nickerson's opinion in *Levine*, Judge Wexler found the reasoning of *Levine* to be "both compelling and correct." Pet. App. 17a. This conclusion indicates that Judge Wexler independently considered Judge Nickerson's determinations, which included resolution of the principal question raised by petitioner—*i.e.*, whether an order amending a surveillance order may permit use of evidence of communications relating to offenses that themselves would not support a surveillance order. *United States* v. *Levine*, 690 F. Supp. at 1169. Petitioner's claim that the district court declined to grant any review of the validity of the order is without merit.

> which is enforcible by an individual. (*Blue* v. *United States*, 384 U.S. 251 (1965).) There is no intent to change this rule. It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding.

If, as this passage indicates, Title III was not intended to confer a right on a grand jury witness to seek suppression in the context of the grand jury proceeding, it would follow that a grand jury witness is not entitled to a review of surveillance orders for that purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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